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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES DARNELL SHACK, Defendant and Appellant.	D054175 (Super. Ct. No. SCD176305)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed.

James Darnell Shack was convicted of murdering the owner of a jewelry store during the course of a robbery. The trial court sentenced Shack to life without the possibility of parole plus consecutive sentences of 25 years to life for use of a firearm and five years because of his conviction of a prior serious felony. On appeal Shack contends the trial court erred with respect to a number of evidentiary rulings and in failing to treat his complaints about an attorney who had represented him during the proceedings as a

request to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We find no errors and affirm the judgment of conviction.

PROCEDURAL HISTORY

On January 21, 2004, the district attorney of San Diego County filed an information which alleged Shack was guilty of murdering Gregory Angert during the course of robbing Angert's jewelry store. According to the information, the murder occurred on July 3, 2003. The information alleged Shack personally discharged and used a firearm and caused the death of another with the firearm within the meaning Penal Code[1] section 12022.53, subdivisions (b), (c) and (d).

Criminal proceedings on the information were suspended on January 22, 2004, and Shack was committed to Patton State Hospital (Patton). Shack was released from Patton in June 2005, but in September 2005 he was once again found incompetent to stand trial. A trial commenced in November 2006, but the trial ended in a mistrial and Shack was once again committed to Patton with an order that he be involuntarily medicated.

Shack was found competent in 2007. In September 2007 the trial court conducted an in-camera *Marsden* hearing and denied Shack's request that new counsel be appointed. The court conducted another *Marsden* hearing in April 2008. At the April 2008 *Marsden* hearing, Shack's counsel stated that although Shack had made statements at the September 2007 hearing which indicated he wanted to represent himself, immediately

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1 All further statutory references are to the Penal Code unless otherwise specified.

following the hearing Shack had agreed to give counsel "a shot at representing" him. The trial court denied Shack's April 2007 *Marsden* motion.

Shack was arraigned on an amended information on August 12, 2008, and trial commenced on August 15, 2008. The jury found Shack guilty of first degree murder with special circumstances; the jury also found true the gun use and discharge allegations set forth in the amended information. By way of a bifurcated trial, the trial court found that as alleged in the amended information Shack had a suffered a prior serious felony conviction which qualified as a strike under the "three strikes" law. As we noted, Shack was sentenced to a term of life without the possibility of parole on the murder convictions and to consecutive 25-years-to-life and five-year sentences on the enhancements.

FACTUAL BACKGROUND

A. *Prosecution Case*

1. *Palomar Jewelers Robbery*

On March 5, 2003, Shack went into Palomar Jewelers and showed Javier Barrantes, an employee of the store, that he had a large amount of cash. Barrantes opened a number of display cases and showed Shack men's and ladies' rings, as well as bracelets and earrings. After several display cases were opened, Shack pulled out a gun, ordered Barrantes to the floor and took 121 pieces of jewelry worth $70,000 from the open display cases. Shack left a number of fingerprints at the store.

Shortly after the robbery, Shack and a friend, Harold Neal, Jr., who was a pimp, traveled to Las Vegas, Nevada, with a prostitute, Macy Neigebauer, who worked for

Neal. Neigebauer successfully pawned the stolen jewelry, which had been placed in small plastic sandwich bags, at a number of Las Vegas pawn shops.

2. *Angert Murder*

On the morning of July 3, 2003, Angert opened the jewelry store he operated on Fifth Avenue in San Diego. At around approximately 10:30 that morning a few blocks away, Shack withdrew $621 in cash from his credit union and immediately paid $300 to a person from whom he had borrowed money.

At some point after 12:30 in the afternoon, three witnesses heard what they thought was the sound of a nail gun or a firearm from inside the jewelry store. After hearing what she thought were gunshots, one witness looked into the store and saw a man, dressed in a white shirt and baggy white pants or long shorts, put his hands on one of the jewelry counters and jump behind the counter. Shortly thereafter, another witness, a friend of Angert, went into the store to investigate and found jewelry on the floor behind a jewelry counter and Angert lying down in a room at the back of the store with blood around his head. Angert was not breathing and Angert's friend called 911.

A medical examiner testified Angert had been killed by a gunshot wound to the chest and that he had also suffered blunt force trauma to the head.

Police found one of Angert's jewelry cases open and items of jewelry lying on the floor. Witnesses testified Angert was fairly diligent in cleaning the glass on the jewelry cases in his store. Nonetheless, criminalists were able to find approximately 100 finger and hand prints on Angert's display cases, including prints from Shack. In particular,

Shack's palm and hand prints were found in positions on a display case which were consistent with someone who had vaulted over the display case.

On the afternoon of July 3, 2003, Shack called his friend Neal from a convenience store near Angert's jewelry store. According to Neal, when he picked Shack up at the convenience store, Shack told Neal: "You gotta get me out of here. I had to shoot this fool." Neal took Shack, who was carrying a black bag with jewels in it, to the apartment of a friend, Larry Gregg.

At Gregg's apartment, Neal and Shack started separating the jewels into smaller piles and putting them into plastic sandwich bags. Gregg and Neal discussed pawning the jewels in Las Vegas and locally. In the course of separating the jewelry, Shack told Gregg: "You know I had to shoot him." Shack explained Angert had tried to grab the gun Shack was using in the robbery.

With Gregg's consent, Neal hid the gun Shack had used to shoot Angert behind a filing cabinet in Gregg's bedroom; later Gregg moved the gun into the filing cabinet.

That evening Shack went to a motel in Chula Vista. On July 7, 2003, Shack pawned a gold bracelet in National City. Shack also called Neal and discussed pawning the jewelry both locally and, as they had with the Palomar jewelry, in Las Vegas.

A few days later Shack contacted a friend, Eddie Frierson, and told Frierson he had some jewelry he needed to sell. In the course of attempting to convince Frierson to accept and pay for the jewelry, Shack and Frierson got into an argument and Shack threatened Frierson by saying: "I already shot one person."

Shack had given some of the rings from the robbery to Gregg. Gregg pawned one of the rings and attempted to pawn a second ring. However, in the course of attempting to pawn the second ring, Gregg had a change of heart and decided to contact police. Gregg let police search his apartment. The information police received from Gregg led them to arrest Neal, who in turn told police what he knew about the murder. Police then arrested Shack and searched his storage locker, where they found a number of pieces of jewelry.

B. *Defense Case*

In his defense, Shack sought to introduce evidence which would show that in fact Angert had been killed by Neal. To that end he produced evidence which undermined Neal's credibility and showed that Neal had controlled disposition of the jewels from the earlier Palomar robbery. Shack also produced evidence that Neal pulled the gun out at Gregg's apartment. In attempting to explain the presence of his finger and hand prints on Angert's display cases, Shack elicited testimony from Angert's mother to the effect that she had seen Shack in Angert's store on a few occasions before the murder.

DISCUSSION

I

In his first argument on appeal, Shack contends the trial court erred in admitting evidence of the Palomar robbery. We find no error.

"Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b)

of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition."[2] (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted (*Ewoldt*).)

In *Ewoldt*, defendant was charged with committing multiple acts of child molestation on the younger of his two stepdaughters. The trial court admitted evidence defendant had committed similar uncharged offenses on the older stepdaughter. In finding no error in admitting the uncharged offenses, the Supreme Court stated: "In the present case, evidence of defendant's prior misconduct is relevant to prove a material fact other than defendant's criminal disposition, because the similarity between the circumstances of the prior acts and the charged offenses supports the inference that defendant committed the charged offenses pursuant to the same design or plan defendant used to commit the uncharged misconduct." (*Ewoldt, supra*, 7 Cal.4th at p. 393.)

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[2] Evidence Code section 1101 states: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

In reaching this conclusion about the admission of defendant's prior acts, the court discussed at some length three facts which such prior acts may be used to establish: intent, common design or plan, and identity. (*Ewoldt, supra*, 7 Cal.4th at pp. 393-404.)[3]

The court noted that the distinction "between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the use of such evidence to prove intent or identity, is subtle but significant. Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 300, p. 238.) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it.

"Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined . . . .' (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 300, p. 238.) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was

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3 In addition to intent, common design and plan, and identity, prior acts may also be relevant and admissible to show, among other matters, motive and knowledge. (*Ewoldt, supra*, 7 Cal.4th at p. 402, fn. 6.)

present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution.

"Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator. For example, in a prosecution for shoplifting in which it was conceded or assumed that a theft was committed by an unidentified person, evidence that the defendant had committed uncharged acts of shoplifting in the same unusual and distinctive manner as the charged offense might be admitted to establish that the defendant was the perpetrator of the charged offense. (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 410, p. 477.)" (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.)

In considering whether defendant's prior acts were admissible to show a common design or scheme, the court found it "useful to distinguish the nature and degree of similarity (between uncharged misconduct and the charged offense) required in order to establish a common design or plan, from the degree of similarity necessary to prove intent or identity.

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal,

intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]

"A greater degree of similarity is required in order to prove the existence of a common design or plan. As noted above, in establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] '[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.' [Citations.]

"To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the

defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]

"The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at pp. 402-403, fn. omitted.)

The court then concluded the similarity between the uncharged molestation of the older stepdaughter and the charged molestation of the younger stepdaughter established a common scheme or plan such that evidence of the uncharged molestations was admissible. "In the present case, the victims of both the uncharged misconduct and the charged offenses were defendant's stepdaughters, who were residing in defendant's home, and the acts occurred when the victims were of a similar age. On three occasions, defendant molested [the older stepdaughter] at night while she was asleep in her bed. When discovered, defendant asserted he was only 'straightening up the covers.' In two of the charged offenses, defendant molested [the younger stepdaughter] in an almost identical fashion and, when discovered, proffered a similar excuse. On one occasion

prior to the commission of the charged offenses, defendant touched either [the younger stepdaughter's] breasts or her vaginal area. This marked the beginning of an ongoing pattern of molesting [the younger stepdaughter]. We conclude, therefore, that evidence of defendant's uncharged misconduct shares sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan. Such evidence is relevant to establish that defendant committed the charged offenses in accordance with that plan." (*Ewoldt, supra,* 7 Cal.4th at p. 403.)

Here, the similarities between the Palomar robbery and the robbery of Angert's jewelry store are more than sufficient to show a common scheme or design. As the Attorney General points out, in the Palomar robbery Shack showed an employee of the store he had a substantial amount of cash, used the cash to induce the employee to open a number of jewelry cases and then pulled out a gun; the record also shows that very shortly before the Angert robbery and murder, Shack withdrew a substantial amount of cash from his credit union and that following the murder the police found one of Angert's jewelry cases had been opened and jewelry was on the floor. This of course strongly suggests that in both robberies Shack showed his victim cash as a means of getting the victims to open locked jewelry cases and then pulled a gun on the victims. The robberies were also very similar in that in both instances Shack used Neal to assist him in fencing the jewels he had stolen. The similarities between the robberies make evidence of the Palomar robbery particularly relevant here because the common design they demonstrate

rebut Shack's contention that, unlike the Palomar robbery, Neal was the gunman in the Angert robbery.

Our conclusion evidence of the Palomar robbery was not excluded by Evidence Code section 1101 does not end our inquiry. (*Ewoldt, supra*, 7 Cal.4th at p. 404.) "Although the evidence of defendant's uncharged criminal conduct in this case is relevant to establish a common design or plan, to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]' " (*Ibid*.) Thus we must "proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*Ibid*.)

"The principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of a common design or plan." (*Ewoldt, supra*, 7 Cal.4th at p. 404.) Here, that tendency is quite strong. As we have noted there is a great deal of similarity between the Palomar robbery and the Angert robbery. Moreover, the source of most of the information about the uncharged offense is fairly trustworthy: it was the victim of the Palomar robbery. In terms of prejudice, the Palomar robbery was far less inflammatory than the Angert robbery and murder. In sum, the challenged evidence of the Palomar robbery was highly probative in that it was strong evidence of the existence of a common scheme or plan and was not unduly prejudicial. Thus the evidence of the Palomar jewelry was not barred by

either Evidence Code section 1101 or Evidence Code section 352 and the trial court did not err in admitting it.

II

The record shows the trial court conducted a number of in-camera *Marsden* hearings. At one of those hearings, in September 2007, Shack suggested he believed he would be better off representing himself. On appeal Shack argues his statements were unequivocal requests that he be allowed to represent himself and that the trial court erred in failing to act on the requests. Our review of the record discloses that although Shack made a number of complaints about his counsel, he in fact made no unequivocal request that he be permitted to represent himself. Rather, the record shows he consistently asked that he be represented by counsel.

As Shack points out, at the September 10, 2007 *Marsden* hearing he made the following statements: "And I'm really, you know, confused, so I'd rather just represent myself because the last attorney that took me -- which was Mr. Robinson, you know, took me to trial and told me to cop out to 25 years to a robbery that I didn't even commit and saying that it will help my murder case. [¶] . . . [¶]

"And then not only that, so much was going on, it just wasn't fair. It was just like it was a bunch of conspiracy. So that's the reason -- you know, I'd rather, you know, if I can speak to 12 jurors, that's fine; that will help me -- even though I might not know all the court procedures or what they do, you know what I'm sayin'? But as far as addressing an attorney again, that's going to be very hard for me to do, your honor. I'm telling you, I don't think I can do that. I don't know if the court is going to have to be removing me

from the court every time it get[s] my turn to speak, then I'm going to speak up. You know, I will speak up when necessary."

Importantly, in addition to these statements the record shows that at the in-camera hearing the trial court denied Shack's *Marsden* motion and then permitted Shack's counsel and Shack to confer privately. The record further shows that during their private discussion, Shack agreed to give his attorney "a shot" at representing him and that counsel advised Shack he could "go pro per" later in the proceedings if he wished to do so.

The court conducted another *Marsden* hearing on April 14, 2008. At the April 2008 *Marsden* hearing, Shack made a number of complaints about his then-current counsel, including counsel's unwillingness to file a *Pitchess* motion. After setting forth his complaints, Shack stated: "So I'm just requesting another attorney. That's all." Thereafter, the trial court denied Shack's *Marsden* motion.

As the Attorney General argues, the trial court did not interfere with Shack's right to represent himself because Shack never made any unequivocal request to do so. The requirement that a motion to proceed in propria persona be unequivocal is based in large measure on the need to prevent abuse: "Criminal defendants have the right both to be represented by counsel at all critical stages of the prosecution and the right, based on the Sixth Amendment as interpreted in *Faretta, supra*, 422 U.S. 806 [95 S.Ct. 2525], to represent themselves. [Citation.] However, this right of self-representation is not a license to abuse the dignity of the courtroom or disrupt the proceedings. [Citation.] *Faretta motions must be both timely and unequivocal. Otherwise, defendants could plant*

reversible error in the record. [Citations.] Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration. [Citation.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1001-1002, italics added.) Importantly, "Of course, a defendant may withdraw his *Faretta* motion before a ruling is made. [Citation.]" (*Ibid*.)

In determining whether a *Faretta* request has been made, a court " 'should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration . . . may be denied.' [Citation.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087.)

Here, the record is clear that even if at the September 10, 2007 hearing Shack expressed a preference for representing himself, after consulting with his attorney, Shack decided to proceed with counsel and effectively withdrew any *Faretta* motion. Thus the record here is clear that in the end Shack did not wish to represent himself. Accordingly, the trial court did not err in failing to act on Shack's statements.

III

In presenting its case, the prosecution offered testimony from a detective who supervised investigation of the Angert murder, Patrick Lenhart. Lenhart testified as to what the three principal witnesses against Shack told investigators when they were

initially questioned and in general what investigators found at the scene of the murder. Lenhart's testimony is the subject of three arguments Shack makes on appeal: Shack's contention the trial court erred in permitting Lenhart to summarize what the three witnesses told him when they were questioned; his contention the trial court improperly permitted Lenhart to testify as to what one of the witnesses told other investigators; and his contention the trial court erred in excluding evidence that in an unrelated proceeding Lenhart had given false testimony. As we explain, we find no error.

A. *Lenhart's Summary of Witness Testimony*

In cross-examining Neal, Gregg and Frierson, Shack's counsel consistently attacked their credibility and attempted to imply they had co-ordinated their testimony with the prosecutor and in the case of Frierson that he was testifying in order to obtain leniency with respect to criminal proceedings that were pending at the time of trial. In rebuttal, and over Shack's hearsay objection, the prosecution offered testimony from Lenhart in which he summarized statements Neal, Gregg and Frierson had provided investigators in 2003, which were consistent with their 2008 trial testimony. On appeal, Shack once again argues Lenhart's testimony about the witnesses's earlier statements was

inadmissible hearsay. Under Evidence Code sections 1236 and 791,[4] "A prior consistent statement is admissible as an exception to the hearsay rule if it is offered after admission into evidence of an inconsistent statement used to attack the witness's credibility and the consistent statement was made before the inconsistent statement; *or when there is an express or implied charge that the witness's testimony was recently fabricated or influenced by bias or improper motive, and the statement was made before the fabrication, bias, or improper motive.* [Citations.]" (*People v. Kennedy* (2005) 36 Cal.4th 595, 614, italics added.) In interpreting section 791, our Supreme Court has noted that in cross-examining witnesses with respect to their failure to tell officers facts to which they later testified or with respect to plea bargains the witnesses has made, a defendant by implication makes a charge of recent fabrication. (See *People v. Dennis* (1998) 17 Cal.4th 468, 531-532; *People v. Noguera* (1992) 4 Cal.4th 599, 629-630.) Moreover, a prior consistent statement is admissible where "it predates *any* motive to lie, not just when it predates all possible motives." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 491-492.)

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4 Evidence Code section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." Evidence Code section 791 in turn provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Here, in cross-examining Neal, Shack's counsel pointed out that for the first time at trial Neal stated that he was planning to go downtown to drop off drugs when Shack called him, that the district attorney's office had provided Neal with his prior testimony and statements and that his second attorney had successfully negotiated an agreement which provided Neal with immunity from prosecution. This cross-examination strongly suggested Neal's trial testimony contained recently fabricated elements which were designed to please the district attorney's office. In light of this cross-examination, the trial court could properly admit Lenhart's recitation of statements Neal made in 2003, before he had successfully negotiated any immunity agreement or had contact with the district attorney's office.

In cross-examining Gregg, Shack's counsel pointed out Gregg had met with the district attorney's office before testifying and that there were inconsistencies between his testimony at trial and testimony he had given at Shack's preliminary hearing with respect to who was holding the gun and jewels when Neal and Shack came to his apartment. At one point, while questioning Gregg about the inconsistencies, Shack's counsel asked Gregg: "Do you remember which is the truth, sir?" The tenor of this questioning strongly implied that as a result of Gregg's consultation with the district attorney, portions of Gregg's trial testimony was recently fabricated. Given the clear implication of the cross-examination, Lenhart's testimony about Gregg's 2003 statements to detectives was admissible under Evidence Code section 791, subdivision (b).

In cross-examining Frierson, Shack's counsel asked whether Frierson believed the prosecutor in Shack's case would make a statement in support of Frierson at his then-

pending sentencing on drug charges if Frierson failed to implicate Shack. The obvious import of this questioning was that Frierson had a very a clear motive to falsely implicate Shack and that the motive arose after Frierson's 2003 statements to Lenhart. Thus Frierson's earlier statements to Lehnart were admissible under Evidence Code section 791, subdivision (b).

In sum, the trial court did not err in permitting Lenhart to testify about statements Neal, Gregg and Frierson made in 2003 during the course of his investigation of the Angert murder.

B. *Double Hearsay*

At one point in his testimony about Neal's statements to investigators, Lenhart related statements Neal had made while Lenhart was not present. In testifying about those statements, Lenhart was relying on the recollections and notes of other investigators. After the trial court realized Lenhart had testified about statements which were not made to him, it sustained Shack's double hearsay objection to such testimony and instructed the jury as follows: "[I]nsofar as any statement by this witness reported what Mr. Neal said through another detective -- in other words, any statement made by another detective to Detective Lenhart about what somebody said, that is inadmissible hearsay, and any answer relating to a statement in that fashion is stricken and the jury will disregard it."

Contrary to Shack's argument on appeal, the trial court's admonishment was sufficient to cure the conceded error in permitting the double hearsay. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1181; *People v. Bell* (1989) 49 Cal.3d 502, 533-534.)

C. *Lenart's Prior False Testimony*

In an attempt to impeach Lenhart, Shack asked the court to admit evidence that in an unrelated criminal matter Lenhart had given false testimony at a preliminary hearing. At the subject hearing, Lenhart testified there were errors in a police report he had prepared and further that he had informed the district attorney's office about those errors on the morning of the hearing. At a side bar conference at the preliminary hearing, the prosecutor informed the court Lenhart had not advised the prosecutor or his law clerk about the errors. After listening to Lenhart's testimony in this case, the trial court excluded the proffered impeachment evidence under Evidence Code section 352. We find no abuse of discretion.

The well-recognized provisions of Evidence Code section 352 state: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that is admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review a trial court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Barnett, supra*, 17 Cal.4th at p. 1118.)

Here, admission of the circumstances surrounding Lenhart's testimony in the unrelated criminal proceeding would plainly consume a fair amount of time and require the jury to determine whether in fact Lenhart had apprised the prosecutor about the errors in his police report. Moreover, Lenhart's credibility was not a matter of sharp controversy at Shack's trial. Lenhart's testimony consisted largely of the recitation of what others told him and what was found at the scene of the murder. Under these

circumstances, the trial court could properly conclude that the consumption of time and distraction introduction of the impeachment evidence far outweighed its probative value. Thus the trial court did not abuse its discretion in excluding it.

IV

In his final argument, Shack contends the trial court erred in excluding video-taped statements he made to himself while being interrogated.

Shack was interrogated shortly after his arrest and at one point during the interrogation, the interrogating officers left the room, but did not turn off a video recorder. While Shack was alone, he muttered: "I didn't do it. Why you want to put me in jail for this shit? I can't believe you put me in this fucking bullshit. I ain't doing no time for him." The trial court sustained the prosecution's objection to admission of this statement, which Shack argued was admissible as an excited utterance under Evidence Code section 1240.[5] On appeal Shack argues the statement should have been admitted. We find no error.

Shack's statement does not qualify as an excited utterance because it does not describe, narrate, or explain an act, condition or event Shack was perceiving at the time of the interrogation. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 809-810.) Indeed, if the statement is to be credited, it describes an event which did *not* happen and was *not*

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[5] Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

"(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

"(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

perceived by Shack. Suffice it to say, Shack's statement could not have been made while Shack was under the stress of the event which he did not believe happened.

For the first time on appeal Shack contends his statement was also admissible under Evidence Code section 1250[6] as evidence of his state of mind. There are a number of difficulties with this argument. Because Shack did not raise the state of mind exception at trial, he is barred from doing so for the first time on appeal. (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.) Moreover as the Attorney General points out, a prerequisite to the state of mind exception "is that the declarant's mental state or conduct be factually relevant." (*People v. Hernandez* (2003) 30 Cal.4th 835, 872.) Here, Shack's state of mind at the time of his interrogation was not relevant to any contested issue and because, in his statement he denies any culpability, it does not explain any of his conduct. Finally, we note that in any event Shack's self-serving statement would be barred by Evidence Code section 1250, subdivision (b), which states: "This section does not make admissible evidence of statement of memory or belief to prove the fact remembered or believed."

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6 Evidence Code section 1250 states: " (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

"(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

"(2) The evidence is offered to prove or explain acts or conduct of the declarant.

"(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.